

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on : 13th March, 2023

Pronounced on: 11th April, 2023

+ **CRL.M.C. 1409/2018**

YASHOVARDHAN BIRLA

.....Petitioner

Through: Mr. Sidhartha Agarwal Sr Adv. with
Ms. Smriti & Mr. Jaiveer Kant, Advs

versus

CECIL WEBBER ENGINEERING LTD & ORS

....Respondents

Through: Ms. Anupama Kaul, Adv. for R-2

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

1. This petition has been filed seeking quashing of complaint *qua* the petitioner, being C.C. No.515453/2016 P.S. Rajendra Nagar pending in the court of Ld. MM, Tis Hazari Court, New Delhi and for setting aside order dated 6th July, 2017 by which Crl. Rev. No.219/2017 filed by petitioner was dismissed by the Ld. Special Judge (PC Act), CBI-08, Central District, Tis Hazari Court, New Delhi.

2. The said complaint was filed under section 138 read with section 141 & 142 of the Negotiable Instruments Act, 1881 against the principal accused M/s Birla Cotsyn (India) Ltd. (A-1) an incorporated company with its registered office at Mumbai. Its Managing Director, Mr. P.V.R. Murthy, who is also a signatory to the cheque in question, has been arrayed as A-2

while the Directors of A-1, who are stated to be in charge and responsible for the conduct of day-to-day affairs of the accused company, have been arrayed as A-3 to A-8. The gravamen of the complaint was that the accused company had approached the complainant company (M/s. Cecil Webber Engineering Ltd.) for advancement of a business loan of Rs.5 crores as an Inter Corporate Deposit (ICD). The said loan was advanced on mutually agreed terms, and in discharge of its liability the accused company issued a cheque for Rs.5 crores with the assurance that the same would be honoured. The said cheque, on presentation, was dishonoured *vide* cheque returning memo dated 27th July, 2012 with remarks “insufficient funds”. Thereafter, pursuant to legal notices, the said complaint was lodged under section 138 NI Act.

3. As per the summoning order dated 9th November, 2012, summons were issued to all accused, including A-1 (the accused company) and A-2 to A-8. During the pendency of the complaint, A-4 to A-8 were dropped from the array of accused by the complainant on the ground that the complainant “*does not want to prosecute them*”. This was recorded in the order dated 31st August 2015 by the Ld. MM. The proceedings continued with respect to A-1 to A-3.

4. This petition has been filed on behalf of A-3, the petitioner herein on the basis that the petitioner was an independent and non-executive Director who was not managing the day-to-day affairs of the accused company and was not a signatory to the cheque.

5. Ld. Senior Counsel for the petitioner submitted as under:

i) Firstly, the complainant made the same allegations against all the accused, as evident from para no.2 where a bald averment is made and no difference is also apparent from the summoning order whereby all the accused have been summoned. However, even though A-4 to A-8 were

dropped from the array of accused at the behest of the complainant, A-3, who was in a similar position as others, was continued as an accused in the array of parties. This was despite the fact that A-2, who was the Managing Director of A-1 (accused company) and was arrayed on that account.

ii) *Secondly*, the petitioner sought discharge and the Ld. MM by order dated 21st November 2016, noted petitioner's submissions that he was a non-executive Director, had no active role to play in the functioning of day-to-day affairs of A-1 (the accused company) and further had resigned from A-1 on 29th December 2012. Refuting the said submissions, complainant's contention was that the petitioner was a Director at the time of issuance of the cheque and that the letterhead on which the promissory note and the receipt was given by A-1 reflected that it was "*Yash Birla Group*" and therefore being part of the conglomerate of which the petitioner was a Chairperson, it would be assumed that the petitioner was in charge of and responsible for the affairs of the accused company. After hearing the submissions of the parties, the Ld. MM noted that the complaint had stated that A-3 was the Director of A-1 and was in charge of and responsible conduct of affairs of A-1's business and on the basis that the letterhead by which the promissory note and the receipt was given, had the appellation "*Yash Birla Group*" on the top as also Form 32 showed that A-3 was Director of A-1. On this basis, the Ld. MM held that this was a matter to be decided in trial and the petitioner was at liberty to prove his defence during the same.

iii) *Thirdly*, by virtue of the impugned order dismissing the revision petition, it was noted by the Ld. ASJ that the defence of the petitioner was that he was a non-executive Director of A-1 cannot be seen at the stage of framing of notice and the petitioner will get adequate opportunity to prove it at an appropriate stage. It was also noted that A-4 to A-8 who were

initially arrayed as accused, were dropped by the complainant since the complainant was having difficulty in serving them.

iv) *Fourthly*, this Court had directed the petitioner on 22nd May, 2019 to file an affidavit specifically deposing whether he was a Director or not on 11th July, 2012. Such an affidavit was indeed filed by the petitioner stating categorically that on 11th July, 2012, he was not an executive Director of A-1 and not managing the day-to-day activities of the accused company. In support of this, an extract from the 69th Annual Report for 2010-2012 was appended which noted that the petitioner was associated with the accused company in non-executive capacity. Further, he was not a signatory to the cheque and in any event, he resigned from A-1 as non-executive Director with effect from 29th December 2012 and in support of this, Form 32 had been filed. It was further noted that other accused persons were also directors of A-1 while A-8 was the Company Secretary and they all have been dropped.

v) *Fifthly*, the Ld. Senior Counsel has relied upon the decision of the Hon'ble Supreme Court in *Sunita Palita v. Panchami Stone Quarry*, (2022) 10 SCC 152 where it has been held that "*Liability depends on the role one plays in the affairs of a company and not on designation or status alone, as held by this Court in S.M.S. Pharmaceuticals*". Since the accused in that matter were held as independent non-executive Directors and not involved in the day-to-day affairs of the company and also the fact that they were not the signatories to the cheque, specific averments have to be made to substantiate the contentions of the complaint that they were indeed in charge and responsible for the day-to-day affairs of the company. Deprecating the hyper-technical view taken by the High Court in that matter based on averments made by the complainant and noting that it was sufficient to meet requirements of section 141 of the NI Act, the Hon'ble

Supreme Court held that the High Court was not right and should have exercised its jurisdiction under section 482 Cr.P.C. vi) *Sixthly*, it was contended that it is not for the complainant to pick and chose whom to drop as an accused and particularly to differentiate without any legal or factual basis.

vii) *Seventhly*, attention was drawn to notice under section 251 Cr.P.C. issued to the petitioner, as A-3, stating that he was a signatory of the cheque dishonoured. Accordingly, the basis of the said notice was wrong and the subsequent proceedings therefore would be untenable.

6. The learned counsel for the respondent, refuting the contentions of Ld. Senior Counsel for the petitioner, contended that Form 32, filed with by the petitioner, clearly noted that he was a Director and not a non-executive Director. Further, when legal notice was issued on 27th July, 2012, there was no reply from the petitioner and also when summons were issued on 9th November, 2012, the petitioner was a Director and resignation, if any, of the petitioner on 29th December, 2012 was post the summoning order.

7. Reliance has been placed on the decision of the Hon'ble Supreme Court in Ashutosh *Ashok Parasrampuriya v. Gharrkul Industries (P) Ltd.*, (2021) SCC OnLine SC 915 where while dealing with the contentions of the accused that they were non-executive Directors and not responsible for the conduct of the company, it was held that it was not open for the High Court to interfere under section 482 Cr.P.C. unless it comes across some unimpeachable, incontrovertible evidence which is beyond suspicion of doubt and which would clearly indicate that the Director could not have been concerned with the issuance of the cheque.

8. Ld. Senior Counsel for the petitioner rebutted reliance on this decision by stating that on facts, the cheques were issued when the accused

were Directors of the company and were responsible for its business activities and were involved in the company. It is further contended that the accused company itself was being wound up and therefore, there was a long delay in the proceedings.

9. Reliance was further placed on the decision in ***S.P Mani & Mohan Dairy v. Snehalatha Elangovan***, (2022) SCC OnLine SC 1238 where the Hon'ble Supreme Court while dealing with section 138 of the NI Act, noted that since no appropriate reply was given to the legal notice providing the material that the said accused was not involved, the opportunity to clarify has not been utilized and the complainant would have reasons to believe that what is noted in the notice has been accepted by the notice. In order to persuade the court to quash the process some sterling incontrovertible material must be available to substantiate this contention. Proviso to section 138 NI Act provides the opportunity to the accused to prove that the act was committed without his knowledge despite his due diligence.

10. Reliance on ***S.P Mani & Mohan Dairy v. Snehalatha Elangovan*** (*supra*) was rebutted by the Ld. Senior Counsel for the petitioner by drawing attention to the fact that the said case was distinguishable and reiterated the decision of the Hon'ble Supreme Court in ***Sunita Palita*** (*supra*) that merely on the designation as Director, and not even connected with the issuance of cheque or the dishonour, they could not be dragged into criminal proceedings. It was reiterated that there was no specific allegation or averment that the petitioner had an active role to play in the functioning of the company at the time when the offence was committed, the allegation made against the petitioner is homologous with those made against A-4 to A-8 who have not been proceeded against, merely being Director of the company is not sufficient to impose liability, the logo on the

promissory note cannot be the basis of petitioner being in charge and responsible for affairs of the company and that the petitioner was not even a signatory to the cheque.

11. It is evident from the perusal of records that *firstly*, the petitioner was not a signatory to the cheque; *secondly*, the Managing Director for the company is already arrayed as A-2, *thirdly*, the petitioner was a non-executive co-Chairman of the accused company, as per the report on Corporate Governance issued by the Yash Birla Group; *fourthly*, Form 32 does not ascribe petitioner as an executive director; *fifthly*, he had resigned from the company in any event on 29th December, 2012. What is evident from the contentions of the parties that there was no reason for the complainant to drop accused A-4 to A-8 from the proceedings merely on the submission that they were difficult to be served whereas continued with A-3, the petitioner, even though he was also in the same category as ‘Director’ but amplified their contention by stating that ‘*the company was part of Yash Birla Group*’. It is also noted that the accused company is now in liquidation *vide* order dated 24th September, 2019 passed by the NCLT, Mumbai.

12. Receiving an ICD of Rs.5 crores was evidently not done under the signatures of the petitioner, nor was the petitioner a signatory to the said cheque which was furnished as part of the promissory guarantee of repayment. There is nothing on the records of the proceedings that there was any communication with the complainant which would have noted an active role of the petitioner in the specific transition that had taken place or the cheque which had been issued *in lieu* thereof. The *dictum* of the Hon’ble Supreme Court in **Sunita Palita** (*supra*) is, therefore, apposite and applicable in these circumstances. Mere designation as a director cannot import vicarious liability for a dishonoured cheque. It was this very

mischief that was sought to be circumscribed, curtailed and avoided by the decision in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*, (2005) 8 SCC 89. The spirit of these decisions by the Hon'ble Supreme Court is that there has to be something more substantial shown by the complainant rather than a bald averment that a particular accused was in charge of the day-to-day affairs of the company.

13. Vicarious liability is a specific species and assumes critical importance, particularly when there is criminal liability involved and therefore, cannot be taken lightly. If such an extension of principle of vicarious liability were to remain, it would go against the very grain and texture of what the Hon'ble Supreme Court has held in a catena of decisions.

14. The Hon'ble Supreme Court in *S.M.S. Pharmaceuticals* (*supra*) has categorically held that it was necessary to specifically aver in a complaint for the purpose of section 141 NI Act that:

“the persons sought to be made liable should be in charge of, and responsible for the conduct of business of the company at the relevant time.”

(emphasis added).

15. This was stated in the context of the issue before the Hon'ble Supreme Court, as to whether a director of a company would be deemed to be in charge of, and responsible for the conduct of the business of the company and therefore deemed to be guilty of the offence. In answering this issue, the Apex Court concluded that:

“Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business.”

16. In *National Small Industries Corporation v. Harmeet Singh Paintal*, (2010) 3 SCC 330 the Hon'ble Supreme Court has reiterated that:

“Every person connected with the company shall not fall within the ambit of the provision. Only those persons who were in-charge of and responsible for the conduct of the business of the company at the time of commission of an offence will be liable for criminal action.”

Merely holding a designation or office in a company was not sufficient for liability under section 141. The Hon'ble Supreme Court further observed as under:

“37. A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in clauses (24), (26), (30), (31) and (45) of Section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company:

- (a) the Managing Director(s);*
- (b) the whole-time Director(s);*
- (c) the Manager;*
- (d) the Secretary;*
- (e) any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act;*
- (f) any person charged by the Board of Directors with the responsibility of complying with that provision:*
Provided that the person so charged has given his consent in this behalf to the Board;
- (g) where any company does not have any of the officers specified in Clauses (a) to (c), any Director or Directors who may be specified by the Board in this behalf or where no Director is so specified, all the Directors:*
Provided that where the Board exercises any power under Clause (f) or Clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form.

38. *But if the accused is not one of the persons who falls under the category of “persons who are responsible to the company for the conduct of the business of the company” then merely by stating that “he was in charge of the business of the company” or by stating that “he was in charge of the day-to-day management of the company” or by stating that “he was in charge of, and was responsible to the company for the conduct of the business of the company”, he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.*

39. *From the above discussion, the following principles emerge:*

(i) *The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.*

(ii) *Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.*

(iii) *Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.*

(iv) *Vicarious liability on the part of a person must be pleaded and proved and not inferred.*

(v) *If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the*

complaint and by virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases." otherwise."

(emphasis added)

17. In ***Jwala Devi Enterprises v. Fadi El Jaouni***, (2018) SCC OnLine Del 10030 this Court has held that as per judicial pronouncements the following principles may be summarised as under:

“(i) It is only those persons who are in charge of or responsible for the conduct of the business of the company at the time of commission of the offence under Section 138 of the Negotiable Instruments Act, 1881 who can be subjected to criminal action with reference to Section 141;

(ii). If the person committing an offence under Section 138 of the Negotiable Instruments Act, 1881 is a company, the person who was signatory to the cheque which is dishonoured is clearly responsible for the incriminating act and would be liable to be proceeded against under Section 141 (2);

(iii). By virtue of the office they hold, the persons working in the capacity of the Managing Director or Joint Managing Director are deemed to be in charge of, and responsible for the conduct of the business of, the company and, therefore, can be proceeded against in terms of Section 141;

(iv). Merely because a person is a director of the company is not sufficient to make him liable under Section 141, there being no deeming that by holding such position he is in charge of, or responsible for the conduct of the business of, the company within the meaning of Section 141;

(v). It is necessary for the complainant to specifically aver in the complaint that at the time the offence was committed, the person sought to be prosecuted was in charge of, or responsible for the

conduct of the business of, the company in terms of Section 141, there being no need for further particulars to be given in the complaint about his role, this being subject to proof at the trial;

(vi). The person who has been summoned as an accused for offence under Section 138 of the Negotiable Instruments Act, 1881 on the basis of averment that he was director of the company accused, he being in charge of or responsible for the conduct of its business cannot get the complaint quashed by the High Court by filing a petition under Section 482 of the Code of Criminal Procedure, 1973 merely on the ground that no particulars as to his role have been set out in the complaint; and

(vii). The person who has been summoned as an accused for offence under Section 138 of the Negotiable Instruments Act, 1881 by invoking the provision contained in Section 141 may persuade the High Court to quash the process in exercise of its inherent power under Section 482 of the Code of Criminal Procedure, 1973 by furnishing "some sterling incontrovertible material or acceptable circumstances" substantiating his contention that he was not in charge of nor responsible for the conduct of the business of the company "at the time the offence was committed" and thereby showing a case that making him stand the trial would be an abuse of the process of court, but not otherwise.

(emphasis added)

18. It is evident from para 2 of the complaint that bald averments have been made against Accused No.3 - 8 being directors of Accused No.1 Company and in-charge of and responsible for the conduct, affairs and business of the company. There is no specific averment made that this was so at the time of the commission of the offence. Also, the signatory of the cheque was also the Managing Director of the Company would be deemed to be in-charge of and responsible for the conduct of the business of the company and therefore, it was not as if the complainant was remediless. Considering that Accused No.4 to 8 were dropped by the complainant,

there was no reason for the complainant to have continued with proceedings against Accused No.3.

19. The reasons provided by the Ld. MM while dismissing the discharge application of Accused No.3 (the petitioner) was limited to adverting to the letter head of “*Yash Birla Group*” in order to continue proceedings against Accused No.3. Merely the mention of the name of Accused No.3 on the letter head as being the Head of the Group, does not *ipso facto* or *ipso jure* make him in-charge of and responsible for the affairs and business of the company at the time the offence was committed.

20. As per Annual Report filed by the petitioner, he was clearly a Non-Executive Director of the Company and therefore the monitoring of executive activities would be in the hands of the Managing Director, Mr. P.V.R. Murthy.

21. The Courts have consistently reiterated that a non-executive director may be the custodian of governance of the Company but are not involved in the day-to-day affairs of running its business and only monitor executive activities of the Company. Reference is being made to the decision of the Hon’ble Supreme Court in *Puja Ravinder Devidasani v. State of Maharashtra & Anr.*, (2014) 16 SCC 1. It is evident that the phraseology used in Section 141 of the Act of being in charge and responsible to the Company for the conduct of the business of Company is a reference to an “*executive activity*” which imports an element of running day-to-day affairs of the Company and would not be extended to a role which is essentially supervisory, policy oriented, of oversight or regulatory i.e. non-executive in character.

22. The phrase ‘*Chairman*’/ ‘*Chairperson*’ of a Company is not specifically defined under the Companies Act and the reference to the word ‘*Chairman*’ has been made in section 175 of the Companies Act 1956

(section 104 of the Companies Act 2013) where the Chairman of a meeting is appointed by its members unless otherwise provided in the Articles of the Company. Reference may also be made to section 203 of the Companies Act 2013 which prescribes the roles of key managerial personnel of a company and makes a distinction with the post of a 'Chairperson'.

23. It is common knowledge that very large business conglomerates spawn and sustain hundreds of companies under them which may be ultimately held by a particular business family or a group of investors, but officers and professionals are appointed to run the day-to-day affairs of such companies. The whole purpose of having a Managing Director and executive directors appointed for a company is to ensure that all executive decisions are resident with that Managing Director and his / her team of executive directors. A number of non-executive Directors or Directors who are not executive Directors are present on the Board of the Companies for their expert independent advice or oversight of the functioning of the company. Even the role of 'Chairman' / 'Chairperson' is not typically of an executive nature since the Chairperson presides over the general meetings or of the functioning of the company and guides its business policies and need not interfere in the day-to-day affairs of the company. Chairperson of large business conglomerates are in fact even further removed from the *minutiae* of everyday operations of the company and distant from the micro-management which is required to be done by the executive directors and officers of the company. Needless to say, this has to be assessed in context of the peculiar facts of each case.

24. In this regard reference may also be made to a decision of the High Court of Karnataka in *Shamanur Shivashankarappa v. India Sugars & Refineries Ltd.*, 2014 SCC OnLine Kar 8179 regarding liability of a

Chairperson of a company in context of the Essential Commodities Act, where it was noted:

“26. The term Chairman is not defined under the Companies Act, 1965. The Chairman is a necessary person in company meetings and is usually appointed by the articles of the Company. Generally, Chairman is the highest post in the Company, who represents the name and fame of the Company. Chairman's role is to attend the meetings and to act according to the byelaws of the Company and also exercise any defined or reserved rights or duties. Regulation 76(1) of table A to Schedule-I to the Companies Act 1956, provides that the Board may elect a Chairman and determine the period for which he has to hold the office. Generally, the Directors elect one of them to be the Chairman of the Board who continues to be as such until he ceases to be a Director or some other Director who is appointed as a Chairman. Normally, the Chairman is a Director who is authorised to preside over the Board and General Meetings. In some companies, it is a practice to appoint an Executive Director namely the Managing Director or whole time Director as Chairman of the Board, to conduct meetings or general meetings and there are some other companies who elect a Non-executive Director i.e. The Director who is not a whole time employee or Managing Director, as a Chairman of the Board or General Meeting. If a Managing Director or a Executive-Director or the person who has been looking after the day today affairs of the Company, if he himself act as a Chairman, then ipso-facto by virtue of the position as a Chairman, he becomes liable for the offences committed by the Company vicariously. Otherwise a Chairman is as good as a Director who is only authorised to preside over the Board and general meetings. In some of the provisions under the Companies Act, the word Chairman is used. Section 175 of the Act deals with, election of a Chairman. Section 177 of the Act deals with voting to be by show of hands in first instance to elect a Chairman, Section 178 of the Act refers to Chairman's declaration of result of voting by show of hands to

be conclusive, with respect to any resolution conducted in the Board Meeting. Section 193 of the Act refers to minutes of proceedings of general meetings and of Board and other meetings, where the Chairman has to conduct the meeting of its Board of Directors. Section 292A of the Companies Act refers to the Audit committee wherein u/s. 292A(10) of the Act says that the Chairman of the Audit committee shall attend the general meetings to provide any clarification on matters relating to audit.

...

28. Looking to the above said powers and duties of the Chairman, it goes without saying that the Chairman is as good as a Director, but as he is higher in position, he presides over the meetings of the Company. Therefore, unless a specific role is given to a Chairman by virtue of articles of the Company to represent the management and participate in the day to day business, conduct and affairs of the Company, he is not liable for all the offences committed by the Company.”

(emphasis added)

25. Creeping up an escalating liability to Chairpersons of large conglomerates/companies for cheques issued in day-to-day affairs of the business of a company would unfairly and unnecessarily expand the provisions of vicarious liability under the provisions of the Negotiable Instruments Act. Particularly, since no prejudice is caused to the complainant in this case as the signatory of the cheque and admittedly the Managing Director of the accused company is already arrayed as A-2 and is continued to be part of proceedings. It does not need to be reiterated, as has been held by various decisions, including the ones noted above, that the High Courts have the power to quash proceedings under section 138 NI Act *qua* those accused who do not fall within the rubric of vicarious liability as now defined and refined by various decisions of the Hon’ble Supreme Court.

26. In view of the above facts and circumstances and the discussion and analysis above, in the considered opinion of this Court, the said complaint and its proceedings would be quashed *qua* the petitioner herein (arrayed as A-3 in the said complaint). Accordingly, the impugned order dismissing the revision by the petitioner is also set aside.

27. The petition is disposed of accordingly.

28. Pending applications (if any) are disposed of as infructuous.

29. Order be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

APRIL 11, 2023/sm